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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 303.

CALMAR STEAMSHIP CORPORATION,
Petitioner,

vs.

SYDNEY KEITH SCOTT, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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Statement.

On November 26 and 27, 1941, the petitioner, through its London broker, Thos. Stephens & Sons, Ltd., insured the *Portmar* with the respondent Underwriters in London, as a commercial cargo vessel, by war risk policies on hull, on a round voyage from a United States Pacific port to the Philippine Islands and return to the United States, for a premium of 1½% (Lloyd's Policy, reproduced on p. 71 of the Record, is one of the three similar policies in suit). The petitioner correctly describes the *Portmar* as an "American cargo steamship" (Petitioner's brief, p. 2).

For the sake of brevity, we do not repeat the movements of the vessel which are detailed in the opinion of the Court of Appeals. They are vividly plotted on the map, Petitioner's Exhibit 53, which is included in the separate volume of exhibits filed with this Court by the petitioner. A reduced scale photostatic copy of Exhibit 53 is attached to this brief, as an Appendix. We do emphasize, however, what the Court of Appeals found as facts, namely, that by the time the *Portmar* reached Sydney December 30, 1941, the Japanese had sunk the British Battleships "Repulse" and "Prince of Wales", and this, following upon the substantial annihilation of the United States Fleet at Pearl Harbor "gave the Japanese full battle fleet command of the Pacific" and a "naval superiority which enabled them to transport troops to almost any desired point and establish it for an air-naval fueling base" (R., p. 793); that Australia's "northern coasts at any rate were in the direst straits . . . and Japanese carriers could range about unobstructed; and Japanese forces might land where they would, substantially unopposed" (R., p. 795); that when the *Portmar* reached Brisbane January 5, 1942, the United States Army took her over, discharged her cargo, sorted it and reloaded part of it together with new cargo, and sent her north to Port Darwin on the north coast of Australia, about 2,100 miles distant from Brisbane (R., pp. 793, 794), into the very waters from which she had been diverted for safety's sake; and that after a side trip from Port Darwin westward to Wyndham with 2,000 drums of high octane gasoline, the Army ordered her back to Port Darwin, and there loaded her with 300 to 400 officers and men of the 148th United States Field Artillery, field guns, ammunition supplies and a naval launch, and sent her from Port Darwin on February 15, 1942, as part of an extremely dangerous military expedition "to reinforce the defense of Koepang across the Timor Sea, north of Australia" (R., p. 794).

The *Portmar* was completely taken over by the United States Army at Brisbane January 5, 1942, regardless of her commercial commitments (R., p. 795), and was thereafter used solely as a unit of the Army's fighting forces in the prosecution of the war. She was kept by the Army in the northern waters of Australia continuously for one month from her arrival at Port Darwin January 19, 1942, until she was bombed at Port Darwin February 19, 1942. That employment and those movements were in no way part of, or connected with, the round trip commercial voyage on which she was insured by the respondent Underwriters.

On the above facts, the District Court found that the Army had taken over the *Portmar* completely for war purposes (R., fol. 2153), and had "prevented the homeward voyage and sent the *Portmar* on to Timor" (R., fol. 2238). The Court of Appeals likewise found that the *Portmar* had been taken over by the United States Army at Brisbane January 5, 1942, and that this had "put an end to the possibility of that return voyage for which alone the Underwriters meant to insure her" (R., pp. 794, 796), and said "In the case at bar the requisition added so notably to the risks of the prescribed voyage that the voyage ceased to be the same" (R., p. 801), and concluded its opinion with the words, "We hold that the voyage ended at Brisbane and that the policy then ceased to cover the ship" (R., p. 802).

There is no ground for granting certiorari.

1. *The decision of the Court of Appeals was unanimous, and petitioner's application for rehearing was denied.*

The decision of the Court of Appeals (R., pp. 792-802, reported at 197 F. (2) 795), dismissing the libel against respondent war risk underwriters on the hull of the *Portmar* was unanimous, and the petitioner's application to the Court of Appeals for rehearing was denied (R., p. 820).

2. *No similar cases pending.*

The petitioner does not claim that there are any other pending cases involving similar facts or law; and so far as we know, there are no other similar pending cases.

The "Free of British Capture" rider on the policies is quoted in full on page 20 of the petitioner's brief. But in its argument that losses from bombs and gunfire are covered *in all circumstances* after the vessel has been requisitioned (Petitioner's Brief, pp. 4, 11, 12, 22, 25), the petitioner omits the qualifying words of the rider, viz. **"losses otherwise covered by this policy"**. The Court of Appeals held that, even assuming the petitioner were right in its interpretation of the meaning of the "Free of British Capture" rider, "the policy was no longer in force when the loss occurred, the voyage having before then come to an end and the policy with it" (R., p. 793), and

> "All provisions of the policy must be read with that limitation ('the prescribed voyage') in mind; for they were ancillary and implementary to that purpose" (R., p. 798).

In any event the "Free of British Capture" clause, as worded in the policies involved in the present suit, is no longer in use. The petitioner's own broker testified that the wording of the rider involved in this suit was used on policies only from 1940 to 1945 (Grotefend R., fols. 792, 793).

3. *No conflict between Circuits.*

There is no conflict of decisions between the Courts of Appeals of the ten Circuits of the United States.

4. *The Court of Appeals' decision is not in conflict with any British or American decisions.*

The petitioner's claim that the decision of the Court of Appeals in this case is contrary to the decision of the

House of Lords in *Rickards* v. *Forestal Land, etc. Co., Ltd.* (1942), A. C. 50, is erroneous. The decision of the Court of Appeals in this case is in accord with that case, and with the law as stated by this Court in *Bradlie* v. *Maryland Ins. Co.* (1838), 12 Pet. 878, 401.

The *Rickards* case involved war risk insurance on British *cargo*, on German vessels which, on the outbreak of war, on orders of the German Government, abandoned their voyages and attempted to reach Germany. One vessel reached Germany. The other two were scuttled. The House of Lords in giving recovery to the assured cargo owners for loss from a war cause, pointed out that *cargo* insurance differs from hull insurance in that insurance on cargo insures not only physical safety of the goods but *the safety of the adventure* upon which they are embarked; whereas *hull* insurance on a vessel for a voyage merely insures the physical safety of the vessel *during* the voyage, not that the voyage will be completed. In *cargo* insurance, termination of the insured voyage short of its destination gives the cargo assured an immediate right to recover even for undamaged cargo as a Constructive Total Loss. It was so held also in *British & Foreign Marine Insurance Co.* v. *Sandy & Co.* (1916), 1 A. C. 650. See also Arnould "Marine Insurance" (13th Ed.) Sec. 222(a).

This distinction was clearly stated by their Lordships in the *Rickards* decision as follows:

By Viscount Maughan at page 69:

> "* * * in the case of a policy on goods in normal form the owner can claim either for loss of goods or for loss of adventure, *while in the case of a policy on the ship the underwriters are liable only on loss of ship and are not liable in respect of loss of adventure.*" (Italics ours.)

and at pages 70, 71:

> "It is clear that the position of underwriters in regard to a policy on a ship is entirely different from

> that of the owner of merchandise. * * * It is now well-settled, contrary to the opinion of LORD MANSFIELD in *Milles* v. *Fletcher* (1779) 1 Doug. (K. B.) 231, that *the loss of the voyage has nothing to do with the loss of the ship.*" (Italics ours.)

By Lord Wright, at page 90:

> "The primary subject of the insurance is the goods as physical things, but there is superimposed an interest in the safe arrival of the goods. This is very old law. Lord Mansfield insisted on applying the same rule to an insurance on a ship, but this view was rejected, and it was said that the *loss of the voyage has nothing to do with the loss of the ship.* The ship is a vehicle employed in general trading, not wedded to any particular adventure." (Italics ours.)

Other vital differences between cargo insurance and hull insurance were pointed out by this Court in *Gulf Refining Company* v. *Atlantic Mutual Ins. Co.* (1929), 279 U. S. 708.

In *Bradlie* v. *Maryland Insurance Co.* (1838), 12 Pet. 378, this Court pointed out that, contrary to the law of insurance on *cargo* for a voyage, insurance on a *vessel* for a voyage does not insure completion of the voyage. Story, J., said at page 401:

> "This was expressly held by this Court, in the case of *Alexander* v. *The Baltimore Insurance Company,* 4 Cranch, R. 370, where it was decided that an insurance on a ship for a voyage, was not to be treated as an insurance on the ship *and* the voyage, or as an undertaking *that she shall actually perform the voyage;* and, only, that notwithstanding any of the perils insured against, she shall be of ability to perform the voyage; and that the underwriters will pay any damage sustained by her, from those perils, *during* the voyage." (Italics ours.)

Arnould "Marine Insurance" (13th Ed.), at the end of §1104 points out that the above statement of law as to *hull*

insurance is the established law of both England and the United States.

The decision of the Court of Appeals in the present case is in accord with the decisions both of this Court and of the House of Lords.

5. *The "Frustration of Voyage" clause.*

As to a "Frustration of Voyage" clause in the policy, the *Rickards* case dealt with the effect of a policy warranty against "frustration of voyage". There was also a warranty against "frustration of voyage" in the *Portmar* policies. The petitioner (Brief, pp. 15, 16) states that it makes no claim based upon the loss or "frustration" of the insured voyage, and Judge Hand pointed out that it could not, inasmuch as the "frustration" clause "is limited to claims for losses of the voyage as such, not of the ship" (R., p. 798). The petitioner's claim is for physical damage to the *Portmar* sustained *after* termination of the insured voyage.

6. *The charter party is res inter alios acta, and its provisions are not part of the respondents' policies.*

Petitioner argues that the terms and provisions of its charter with the Government should be read into the respondents' policies (Brief, pp. 19-22). The policies do not refer to the charter, nor were respondents parties to the charter. This Court has said:

> "* * * the contract related to a particular ship just as it related to a particular voyage. Neither could be changed without departing from the contract, which could not be done without the consent of both parties." *Texas Company* v. *Hogarth S. Co.* (1920), 256 U. S. 619, 627.

7. *The "Held Covered" clause.* The "Held Covered" clause (usually called the "deviation clause"), referred to at pages 22/23 of the petitioner's brief provides:

> "Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required" (R., p. 714).

The District Court held (R., fol. 2253), and both parties agree (see Petitioner's Brief, p. 22), that that clause becomes operative only where there has been a *voluntary* deviation or change of voyage, and that it does *not* apply to the present case, where the vessel was taken over by sovereign authority.

Although the presence of the "Held Covered" clause is necessary to avoid automatic termination of the policy in case of a *voluntary* deviation or change of voyage, the petitioner argues (Brief, p. 23) that if there has been a deviation or change of voyage "under compulsion of sovereign control," the insurance coverage "should be held to continue in effect" as a matter of law, although there is no such provision in the insurance contract. There is no authority anywhere for the petitioner's contention, and to state it is its own refutation. The petitioner asks this Court to inject into the insurance contract an agreement by underwriters, which is not only not in the contract, but which no Court or text writer has ever suggested was *implied* in the contract.

Quite apart from the above, what happened to the *Portmar* was vastly different from a mere deviation from the insured voyage or a mere change of voyage. It was definitely the termination of the prescribed voyage. Such termination results independently of the assured's volition and knowledge. *Parkin* v. *Tunno*, (K. B. 1809), 11 East. 22; *Speyer* v. *N. Y. Ins. Co.*, (1808), 3 Johns. (N. Y.), 88; *Anderson* v. *Marten*, (1908), A. C. 334.

It was that the vessel was taken over by the United States Army at Brisbane, January 5, 1942, and was at that moment converted into a unit of the United States Military Forces, employed by the Army for over a month in the northern waters of Australia, where a Japanese invasion was expected, culminating in her being sent as a warship carrying troops, guns, ammunition and a landing launch on the dangerous military attempt to occupy the Port of Koepang which had already been bombed by the Japanese. The Court of Appeals rightly held that such a change in character and use of the *Portmar* was not within the coverage of the respondents' policies, and that the voyage on which the respondents insured the vessel had been terminated prior to the damage sustained by her.

8. Respondents' agreement on February 6, 1942 was limited to cover "this diversion", i. e. "to Australia on outward voyage."

As to the respondents' agreement to change the policy coverage from a round voyage to the Philippines and return, to a round voyage to Australia and return, the petitioner through its American broker, Mather, Ltd., cabled its London broker, Thos. Stephens, Ltd. on January 24, 1952:

> "PORTMAR DIVERTED TO AUSTRALIA ON OUTWARD VOYAGE UNDER GOVERNMENT ORDERS. STOP HOLD COVERED PENDING FURTHER ADVICES.
>
> MATHER CO."
>
> (Exhibit 4, R. 586.)

That was all that respondents were told. Respondents' reply to petitioner's London broker is set forth in Stephens' letter to Mather reading:

"We have your cable of the 24th January last, advising that this vessel insured for the voyages from U. S. Pacific ports to the Philippines and return to U. S. has been *diverted to Australia on the outward voyage under Government orders.*

"We confirm that all Underwriters on our War Risk Policy have agreed to hold *this diversion* covered pending your further advices. (Italics ours.)

Yours truly,

THOS. STEPHENS & SONS, LTD.

H. STEPHENS,
Director"

(Exhibit 5, R. 593.)

Respondents' agreement, stated in that letter, was not that respondents would cover the *Portmar* thereafter until further advice, but that respondents would cover "this diversion", i.e. a diversion *"to Australia on the outward voyage"*, pending further advices. Respondents' agreement was only to cover a changed *round voyage*,—not, as petitioner claims, everything that might have happened up to February 6, 1942, the date of Stephens' letter.

The cases cited on pages 24, 25 of the petitioner's brief were all cited in the petitioner's brief in the Court of Appeals. They do not support the petitioner's argument. In most of them the deviation was *voluntary*, to avoid danger. In none of them was the vessel taken over by the Government for military use as in the case of the *Portmar*. Furthermore in none of them did the policy contain an express warranty against the cause which produced the deviation,—excepting *Aktiebolaget Bank* v. *American M. M. Ins. Co.* (*The Ada*) (1925), 241 N. Y. 197, which did contain a warranty against restraint or detainment by the British Government or their Allies, and which, on page 211, is irreconcilably contrary to the petitioner's contention.

9. *Petitioner seeks to bring up questions not decided by the Court of Appeals.*

Although the petition herein is limited to the alleged error of the Court of Appeals in holding "that the voyage ended at Brisbane and that the policy then ceased to cover the ship" (R., p. 802), the petitioner suggests, in a footnote (pp. 10, 11), that if the writ be granted, it will ask to be heard on other questions. If that be proper practice in this Court, and the writ is granted, then respondents should be entitled to have this Court decide all the other numerous issues which were argued in the Court of Appeals, but which the Court of Appeals did not find it necessary to decide, and did not decide.

10. *The petitioner has an adequate remedy against the United States.*

The petitioner has an adequate remedy against the United States, which took and used the *Portmar* in the winning of the war, and which on November 17, 1942 requisitioned title to the *Portmar* in her partially repaired condition at Brisbane under Section 902 of the Merchant Marine Act, 1936 (R., p. 796; see Certificate of Requisition, R., fols. 1873, 1874).

Conclusion.

No valid ground has been shown for granting a writ of certiorari in this case, and the petition therefor should be denied.

Respectfully submitted,

RUSSELL T. MOUNT,
Counsel for Respondents.

Dated New York, September 25, 1952.

Appendix.

Photostatic Copy of Map, Petitioner's Exhibit 53, Showing the Originally Ordered Course of the *Portmar* (for the Philippines) in Dotted Line; and the Actual Movements of the *Portmar* in Solid Line.

(Opposite ☞)

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MEMORANDUM FOR THE RESPONDENTS IN REPLY TO *AMICUS CURIAE* MEMORANDUM OF THE UNITED STATES.

The Acting Solicitor General's Memorandum as *amicus curiae* urges review of this case, alleging that "The United States is financially interested in the outcome." (Brief, p. 2.) This allegation is not correct. The petitioner's suit against respondent underwriters in this case is under hull voyage insurance policies on the *Portmar*. The petitioner's suit against the United States in Case 262 is for breach of the terms of the charter party of the *Portmar*, which was chartered by the petitioner as owner to the United States as charterer. The charter is not referred to anywhere in the respondents' policies (R., p. 71). The petitioner also has pending against the United States in the Court of Claims a proceeding (No. 48,509) to recover for the

PACIFIC OCEAN

AND THE BAY OF BENGAL

Compiled and Drawn in the Cartographic Section of The National Geographic Society for

THE NATIONAL GEOGRAPHIC MAGAZINE

Gilbert Grosvenor, Editor

Scale 1:23,500,000 or 434 miles to the inch at the Equator

Mercator Projection

International Boundaries as of September, 1, 1939 the day Germany invaded Poland

James M. Darley, Chief Cartographer; Culture by Appbia E. Holdstock and Donald G. Bouma; Physiography by John J. Brohm

Washington

September, 1943

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